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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PHOENIX BULK CARRIERS, LTD., Plaintiff, - against - AMERICA METALS TRADING, LLP Defendant.	10 Civ. 2963 (NRB)

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR COUNTERSECURITY

PRELIMINARY STATEMENT

This memorandum is submitted on behalf of the Plaintiff Phoenix Bulk Carriers, Ltd. ("Phoenix") in opposition to the motion by Defendant America Metals Trading, LLP ("AMT") for countersecurity under Supplemental Admiralty Rule E(7). For the reasons set forth below, the motion should be denied in its entirety.

SUMMARY OF ARGUMENT IN OPPOSITION TO MOTION

Defendant AMT is not entitled to countersecurity because its "counterclaim" arises from contracts which are separate and distinct from the contracts on which Phoenix's main claim is based. AMT's counterclaim involves losses allegedly suffered in connection with two contracts entered into in 2007 which allegedly Phoenix failed to perform.[1] Phoenix's original claim involves demurrage due under contracts from 2008, all of which were performed and on which AMT owes demurrage. Countersecurity under Supplemental Rule E(7) can only be required where the counterclaim arises from the "same transaction or occurrence" as the original claim. Since AMT seeks countersecurity on claims arising from wholly unrelated and distinct transactions, there is no legal basis upon which its application should be granted.

RESPONSE ON THE FACTS

The facts relevant to the Court's determination of AMT's motion for countersecurity are straightforward and not in material dispute.

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[1] Phoenix denies that there was any obligation to perform the 2007 contract(s), and notes that the purported "counterclaim" was never even quantified by AMT until Phoenix commenced arbitration on its claims for demurrage on the performed voyages from 2008. In the context of an application for countersecurity, the merits of the counterclaim are generally not reviewed unless it is challenged as being frivolous. While Phoenix does consider AMT's counterclaim to be frivolous within the meaning of a Rule 13 compulsory counterclaim, since it clearly arises under separate and distinct contracts which do not give rise to a right of countersecurity in any event (*see* discussion below), there is no need to address whether it is also frivolous on the merits .

The claim lodged by Phoenix involves outstanding demurrage due under contracts of charter party entered into and performed in 2008, including: (i) a January 21, 2008 charter involving the M/V CAPT EGGLEZOS; (ii) a June 30, 2008 charter on the M/V SANTO SUCCESS; and (iii) an August 18, 2008 contract for a shipment on the M/V PLEIADES. (*See* Verified Complaint at ¶¶ 5, 6 &7.) The amount due from AMT on these three contracts totals $656,900. (Complaint at ¶ 10.) The evidence that will be produced before the panel of arbitrators who will hear the merits of the Phoenix claims will reflect the fact that with respect to several aspects , AMT does not even deny money is due but simply has refused to pay . (*See* Coll Decl. at ¶ 3-7.)

The "counterclaim" lodged by AMT relates to two entirely separate and distinct charter party contracts, both purportedly entered into on March 23, 2007 for separate voyages to be performed in April and May of 2007. (*See* AMT's Answer and Counterclaim at ¶12.) AMT alleges that because Phoenix failed to perform those contracts, AMT suffered damages of $591,161. (*See* Counterclaim at ¶16.)

As is evident from the foregoing, Plaintiff's claims under the 2008 contracts (all involving outstanding demurrage) and the Defendant's "counterclaim" (arising from two allegedly non-performed charters from 2007) involve entirely separate transactions/contracts, with no common facts or issues of law whatsoever. Phoenix's claims involve demurrage due on voyages which were performed, and to the extent AMT maintains some defense at the arbitration the facts and law relevant to those disputes will, of necessity, involve a review by the panel of the circumstances surrounding the loading and discharge of the vessels and the time used in those operations. (*See* Coll Dec'l at ¶ 3-10.) By contrast, the counterclaim asserted by AMT relates to a purported failure to perform two contracts from 2007, and will obviously implicate issues completely unrelated and distinct from those involved in the 2008 contracts.

Recognizing that the counterclaim does not arise under the same transaction or occurrence as Phoenix's original claim, AMT has submitted a somewhat rambling declaration from a Mr. Luis Monteiro (a director of AMT), which relates, in somewhat convoluted fashion, a history of prior contractual relationships with various non-parties including an entity named National Material Trading LLC ("NMT"), a company referred to only as "Cosipar", American Metals Trading (USA),and others. This declaration is apparently designed to portray an "interrelatedness" (to use Mr. Monteiro's word) between these various voyage charters because, on occasion, claims arising on one contract were the subject of a commercial workout on another. Apart from the fact that such a situation, even if true, would not pass the test for a "counterclaim under Rule E(7) (see discussion below), the mere fact that there were 2 workouts in the past does not by itself support his conjecture that charters between Phoenix and AMT, on the one hand, and charters between Phoenix and NMT are "interrelated." Nor, for that matter, does Mr. Monteiro explain how the 2007 contracts between Phoenix and AMT are in any way related to the 2008 performed contracts. Finally, he provides no documentation to support the self-serving claim that AMT is an alter ego of NMT Indeed, he provides no basis upon which he can even speak for non-party NMT, and apparently he has no affiliation with that company.

Close review of the specifics of Mr. Monteiro's declaration reveals that AMT's position that its counterclaim is logically connected to Phoenix's original claims is devoid of any merit. In his declaration, Mr. Monteiro makes reference to only two occasions (in the last 13 years) where amounts due on one contract were subsequently worked out through payments due on a subsequent contract. At ¶6 of his declaration, he makes reference to the fact that non-party NMT owed Phoenix money in 2004 and worked off that debt in a future contract. He does not, however, explain how Phoenix's and NMT's handling of that matter some six years ago implicate the contracts at issue, or AMT for that matter - which did not even enter the charter scene for another 3-4 years. (See Coll Dec'l at ¶¶ 14-17.)

The only other reference to a workout made by Mr. Monteiro is found at ¶¶s 14-15 where he discusses AMT's failure to perform a contract in January, 2009. Here, he merely observes that the claim was partially resolved through some arrangement between AMT and NMT whereby NMT chartered the vessel CLIPPER MONARCH from Phoenix. No explanation is provided, however, as to how a commercial workout of claim on a subsequent (and wholly unrelated) contract in 2009 renders the claims and counterclaims at issue as arising from the same transaction or occurrence. In addition, the situation that may have existed between AMT and NMT in 2009 which prompted NMT to charter the CLIPPER MONARCH under terms which partially worked off the 2009 non-performance claim is a matter between AMT and NMT, but it does not render the claims and counterclaims at issue here related for purposes of an application for countersecurity. (*See* Coll Dec'l at ¶ 18-19.)

POINT I

CLAIMS THAT ARISE UNDER A CONTRACT SEPARATE AND DISTINCT FROM THE CONTRACT UNDER WHICH THE MAIN CLAIM ARISES DO NOT GIVE RISE TO A RIGHT OF COUNTERSECURITY.

Defendant AMT's application for countersecurity is made pursuant to Supplemental Admiralty Rule E(7)(a) which provides, in relevant part, that:

> [w]hen a person who has given security for damages in the original action asserts a counterclaim that arises from the transaction or occurrence that is the subject of the original action, a plaintiff for whose benefit the security has been given must give security for damages demanded in the counterclaim unless the court, for cause shown, directs otherwise.

The lynchpin for a district court's award of countersecurity is the determination of whether the counterclaim arises from "***the transaction or occurrence that is the subject of the original action***", and it is axiomatic that in order to be entitled to countersecurity, it is incumbent upon the applicant (*i.e.* AMT) to bring itself within the parameters of the Rule.

In determining whether a counterclaim arises from the same transaction or occurrence, it is well settled that courts apply the same test for the determination of whether a counterclaim is compulsory pursuant to Fed. R. Civ. P. 13(a)(1). *See Eastwind Mar., S.A. v. Tonnevold Reefer 7 KS*, 2008 U.S. Dist. LEXIS 92566; 2008 A.M.C. 2827 (S.D.N.Y. 2008) (in assessing whether different claims arise from the same transaction or occurrence for purpose of an E(7) countersecurity application, courts apply the same test as used in determining whether a counterclaim is compulsory under FRCP 13); *see also, Voyager Shipholding Corp. v. Hanjin Shipping Co.*, 539 F.Supp. 2d 688, 691 (S.D.N.Y. 2008); *Incas & Monterey Printing & Packaging, Ltd. v. M/V SANG JIN*, 747 F.2d 958, 964 (5th Cir. 1984).

In determining whether a counterclaim is compulsory for purposes of Fed. R. Civ. P. Rule 13(a), the Second Circuit has indicated that the analysis generally includes consideration of several factors, including:

1. an identity of facts between an original claim and the counterclaim;
2. a mutuality of proof; and,
3. a logical relationship between the original claim and the counterclaim.

See Adam v. Jacobs, 950 F.2d 89, 92 (2d Cir. 1999); *Federman v. Empire Fire & Marine Ins. Co.,* 597 F.2d 798, 811-12 (2d Cir. 1979). In *Adam*, the Court noted that the test for determining whether a counterclaim is compulsory turns on whether "a logical relationship exists between the claim and the counterclaim" and whether the essential facts of the claims are "so logically connected that considerations of judicial economy and fairness dictate that all the issues be resolved in one lawsuit". *Adam*, 950 F.2d at 92, *quoting United States v. Aqua Velva*, 615 F.2d 12, 22 (2d Cir. 1980).

As noted above, in the context of an application for countersecurity pursuant to Admiralty Rule E(7) , courts apply the very same criteria to determine whether a counterclaim will give rise to a right of countersecurity. More often than not, and in the context of a contractual relationship, courts will look to see whether the counterclaim arises from the same contract or the same voyage as the original claim. This was the situation in *Tang Kheok HWA Rosemary v. Jaldhi Overseas Pte Ltd.*, 531 F. Supp. 2d 586, 589 (S.D.N.Y. 2008) where the court noted that the counterclaims - flowing from the same oral contract/agreement - were essentially the "flip side" of the plaintiff's main claim and thereby provided a basis for countersecurity. Numerous other decisions provide similar guidance. *See, e.g., Ocean Line Holdings Ltd. v. China Nat'l Chartering Corp.*, 578 F.Supp. 2d 621 (S.D.N.Y. 2008) (main claim and the counterclaim related to losses that resulted from the grounding, destruction and sinking of the vessel, thereby rendering the counterclaim an appropriate subject for countersecurity); *Front Carriers Ltd. v. Transfield ER Cape Ltd.*, 2007 U.S. Dist. LEXIS 85177, 2007 WL 4115992 at *1 (SDNY Nov. 19, 2007) (claim and counterclaim asserted by each side related to breach of the same contract of affreightment); *Rice Co. v. Express Sea Transp. Corp.*, 2007 U.S. Dist. LEXIS 84300 (S.D.N.Y. 2007) (counterclaim involving failure to pay hire for use of the vessel involved the same voyage on which the plaintiff's main claim was based thereby providing basis for countersecurity); *Dongbu Express Co. v. Navios Corp.*, 944 F.Supp. 235 (S.D.N.Y. 1996) (both claim and counterclaim arose from breach of the same charter agreement).

In a situation very similar to the case here, Judge Baer rejected an argument that claims involving separate contracts could nevertheless be considered sufficiently connected for purposes of a counterclaim because there was a "logical relationship" between the contracts, one having been entered into as a consequence of the other. *Eastwind Mar., S.A. v. Tonnevold Reefer 7 KS*, 2008 U.S. Dist. LEXIS 92566 (S.D.N.Y. 2008). In discussing why any such connection (even if such a *sine qua non* connection could be shown) would ***not*** suffice, the *Eastwind* Court noted that under the test for determining whether a counterclaim qualifies for the grant of countersecurity, a defendant must show some identity of the facts and/or mutuality of the proof. Even where the contracts may bear some relation to one another, such relation alone will not suffice to establish that the claims "arise out of the same transaction or occurrence".

A similar result was reached by Judge Reys in *May Ship Repair v. Oil Barge HT-100*, 2009 U.S. Dist. LEXIS 75804; 2009 A.M.C. 721 (E.D.N.Y. 2009). Here, and not unlike the present effort by AMT, the defendant sought to connect unrelated claims arising under separate contracts on the basis that there was a relationship between them because there would have been no repair contract (*i.e.* the contract on which the counterclaim was based) but for the previous casualty (giving rise to the main claim). The *Mays* Court rejected this argument, holding that any such connection could not support a finding that the counterclaim arose from the same transaction or occurrence. The Court further noted that even if the repair contract giving rise to the counterclaim was a by-product of the casualty, such a *sine qua non* relationship would be insufficient to establish the same transaction or occurrence criteria.

In its submissions in support of the application for countersecurity, AMT does not argue, nor can it, that its counterclaim arises from the same contract(s). They clearly do not. Nor, for that matter, does AMT argue - as defendants in *May Ship Repair* and *East Wind* did - that there was some ***logical connection*** between the claims in the main action and the claims in the counterclaim which provided sufficient nexus so as to support a claim for countersecurity. Instead, AMT argues that because Phoenix settled a claim with a non-party years ago through a commercial workout, and because a similar commercial workout occurred in a claim arising under a 2009 contract which somehow involved AMT and NMT (the precise relationship prompting this shared settlement never having been articulated), Phoenix's demurrage claim against AMT under 2008 contracts and AMT's claims from contracts in 2007 meet the same transaction or occurrence test. The argument is so flawed and unsupportable that little more needs to be said beyond the fact that ATM's counterclaim does not satisfy the Rule 13(a) criteria. Accordingly, AMT's application should be denied.

In this respect, there can be no debate that there is no identity of facts between Phoenix's claims under the 2008 contracts and Defendant's claims under the 2007 contracts. The 2008 claims are for demurrage; the 2007 counterclaim is for an alleged non-performance.

Similarly, there is no mutuality of proof since the claims involve completely separate voyages, in different years, and arise from wholly different types of claims.

Finally, there is no basis, nor does AMT even suggest, that there is any logical relationship, let alone any relationship between these claims. Instead, AMT argues that there is some amorphous "interrelationship" (stemming from two workouts, one which did not even involve AMT) that somehow makes the grade. It does not. There is no relationship, let alone a logical relationship between these claims.

Finally, some mention should be made of Defendant's reliance on Judge Lynch's decision in *Voyager Shipholding.* (*See* Defendant's Memo at 10). While Judge Lynch correctly noted that in the evaluation of whether a claim qualifies as a compulsory counterclaim, a broad view should be taken in determining whether there exists a logical relationship between the two claims, his comments do not mandate that any time a defendant points to some tangential relationship it will suffice, and there is nothing in the language of that decision, or the authority cited therein, which even remotely supports the notion that claims under entirely separate contracts qualify. Indeed, the result reached in the V*oyager Shipholding* decision reinforces the point. There, countersecurity was determined to be appropriate because the claims and counterclaim all related to the same charter agreement. The same cannot be said of the situation here.

Everyone wants security. The Rules define when security can be had. The Defendant is not entitled to countersecurity in the circumstances of this case because its counterclaim does not arise from the "same transaction or occurrence" as the main claim. For that reason, the application should be denied.

Dated: New York, New York
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Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 30, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will automatically send email notification of such filing to all attorneys of record. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified below in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronic Notice of Electronic Filing.

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